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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 431

WALLACE GLICK, by his next friend Bessie McGinty, and BESSIE McGINTY,
Petitioners,

vs.

BALLENTINE PRODUCE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Wallace Glick, by his next friend Bessie McGinty, and Bessie McGinty, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 14, 1965.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, pp. A1-A9) is reported at 343 F.2d 839.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1965 (Appendix B, p. A10). A petition for rehearing en banc and a petition for rehearing were denied on May 10, 1965 (Appendix C, p. A11). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether a transferee federal district court (Missouri) may, under 28 U.S.C. § 1404 (a), disregard the public policy and interests of the forum (Arkansas) in applying either vested rights or forum preference notions of conflict of laws in a diversity death action.

2. Whether a court of appeals can turn death-action survivors completely out of court by failing to remand under 28 U.S.C. § 2106 for trial on issues properly pleaded in a federal court governed by notice pleading adopted by the Federal Rules of Procedure.

3. Whether the Missouri transferee court can, under 28 U.S.C. §1404 (a), require wrongful death litigants to conform their complaint to "Missouri law in all respects", in view of *Van Dusen* v. *Barrack*, 376 U.S. 612, decided during the pendency of this case below.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

28 U.S.C. § 1404 (a).
28 U.S.C. § 2106.
Arkansas Constitution, 1874, as amended, Article 5, § 32.

Ark. R.S., 27-610.1, Acts 1961, No. 137, § 1, p. 323.
Ark. R.S., 27-805, Acts Feb. 1, 1843, § 1, p. 105.
Ark. R.S., 27-906, Acts 1957, No. 255, § 1, p. 790.
Ark. R.S., 27-907, Acts 1957, No. 255, § 2, p. 790.
Ark. R.S., 27-909, Acts 1957, No. 255, § 4, p. 790.
(Texts appear in Appendix D, pp. A12-A13).

STATEMENT.

A. The forum was in Arkansas.

"This action was instituted on April 17, 1963, in the United States District Court for the Western District of Arkansas by Wallace Glick, a minor, and Bessie McGinty * * *, Missouri citizens, seeking to recover damages from Ballentine Produce, Incorporated * * *, an Arkansas corporation, having its principal place of business at Alma, Arkansas, for the wrongful death of Marvin Glick"[1] and for property damage to the fatal automobile. Diversity of citizenship and the requisite amount in controversy conferred jurisdiction.

Petitioners "alleged in their complaint that 'Wallace Glick is the surviving heir at law of Marvin Glick'; that 'Bessie McGinty was the lawful wife of Marvin Glick'; and that Bessie McGinty 'is the Next Friend as the natural guardian of their son, * * * Wallace Glick.' The complaint further alleged that: 'On October 14, 1962, in a public highway U. S. 71 By-Pass in Jackson County, Missouri (respondent's) vehicle, being driven by an employee of (respondent) as agent in the scope of employment for respondent), was negligently caused to collide with a vehicle being driven by Marvin Glick, deceased.'"[1]

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1. Quotation is from the opinion below, printed as Appendix A. "R." refers to pages in the record reproduced for use of the Court of Appeals, nine additional copies having been filed herein.

A pre-trial order of Judge Miller directed the filing of an amendment to indicate the qualification of Bessie McGinty as administratrix of the estate of Marvin Glick (R. 7), and the letters of administration filed indicated the date of death as October 14, 1962 (Appendix A, p. A2).

Petitioners "sought to recover pecuniary damages in the amount of $162,000 plus damage to their automobile in the sum of $4,000, or a total of $166,000.

B. Respondent filed answer in Arkansas court; then later moved for change of venue under 1404(a).

"On February 15, 1964, after the filing of the answer which incorporated a motion to make more definite and certain, (respondent) filed a motion for change of venue under 28 U.S.C.A. § 1404 (a)"[1] which motion was granted and Judge Miller ordered transfer on February 25, 1964 (R. 7).

C. Once venue was changed to Missouri, respondent pressed for dismissal.

"The following proceedings transpired in the United States District Court for the Western District of Missouri (Judge Duncan).

"On March 20, 1964 (respondent), filed a motion to dismiss the complaint for failure to state a cause of action or to state a claim upon which relief could be granted. On March 23, 1964 (petitioners), filed a motion to retransfer the cause to the Arkansas district court."[1]

D. Transferee Mssouri court ordered dismissal unless amendment was made to comply with Missouri law "in all respects."

April 24, 1964, Judge Duncan entered the Order Overruling Motions to Retransfer and to Dismiss and Granting

(Petitioners) Twenty Days in Which to File Amended Complaint (R. 16-23). The order recited that petitioners "will be granted twenty days from the date of the filing of this order in which to file Amended Complaint to comply with the laws of the State of Missouri in all respects" (R. 22).

E. Petitioners relied on Van Dusen v. Barrack to require application of Arkansas law.

Petitioners filed their Motion to Modify Order, pointing out that *Van Dusen* v. *Barrack*, 376 U.S. 612, had been handed down subsequent to submission of briefs on the previous motions (R. 24) and contending that *Van Dusen* requires the court to apply Arkansas law rather than Missouri law "in all respects" and so the order would exceed the jurisdiction of the Missouri court (R. 23-25). Upon the overruling of this motion (R. 26), petitioners filed their petition for writ of prohibition or mandamus (R. 26), seeking vacation of the order compelling amendment to comply with Missouri law in all respects. The Court of Appeals granted leave to docket the writ but denied its issuance without prejudice to the right of petitioners to present the questions on appeal (R. 29). Appeal was thereupon taken after formal dismissal by the district court (R. 29-30).

F. The Court of Appeals affirmed dismissal without a remand, leaving petitioners remediless.

Dismissal was affirmed in these words:

"From what has transpired, we believe Judge Duncan was justified in concluding that 'the sole reason for attempting to maintain the action in Arkansas is [because] the laws of that jurisdiction are more favorable to the elements of damage than * * * the laws of Missouri.' (Petitioners) concede as much. Although they seemingly have recognized from the beginning that their complaint was de-

ficient under Missouri law, they obstinately refused the opportunity to amend their complaint to state a cause of action. Perhaps they are more desirous of attempting to establish a new principle. Be that as it may, on the record and in the light of the controlling legal principles, we are required to affirm the judgment of dismissal." (Appendix A, p. A9).

G. Petitioners' request for consideration en banc and petition for rehearing based on overlooked authority was denied.

Petitioners by their after-decision plea[2] pointed out that the modern forum preference rule is guiding practically all the current conflict of laws decisions, state and federal; further, that the cases relied on by the court of appeals failed to decide the public policy features of any conflict of laws method.

Also noted was that the authority of *Restatement I* and Professor Leflar's earlier writings, cited by the court, has been overturned by *Restatement II* and Professor Leflar's current writings. Note was also taken of Professor Ehrenzweig's analysis that forum preference is the fundamental historical principle of conflict of laws.

Additionally, the petition for rehearing pointed out that the court had overlooked a recognized duty to remand under 28 U.S.C. § 2106 for further proceedings once it was held that petitioners were mistaken in their reliance on forum preference doctrine. It was submitted that there was a proper pleading at the forum of the claim by Bessie McGinty for auto damage and there was proper pleading

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2. Petitioners have filed an additional nine copies of their Request for Consideration by Court *En Banc* and Petition for Rehearing, which appears as pp. 11-13 of the original proceedings in the Court of Appeals.

of Wallace Glick's claim for wrongful death, even if the pleadings be tested by Missouri substantive law.

The plea was denied (Appendix C, p. A11).

REASONS FOR GRANTING THE WRIT.

I.

Out of the welter of discussion, judicial (see *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796, and citations therein) and commentary,[3] concerning modern conflict of laws methods, one thing stands out: under any recognized method, consideration of public policy of the forum is a central and necessary step. Kelso, "The Process of Analyzing Choice of Law Problems," 1959 *Wash. Univ. L. Q.* 37.

When inferior courts, as here, have taken a position "repudiated by courts and commentators everywhere" in "a return to outmoded territorial and vested rights theories of law long ago outgrown by our jurisprudence" (language of Mr. Justice Black, dissenting in *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 220-221), this Court should exercise its power of supervision to bring this litigation back within the realm of fairness to the parties and to guide litigants nationwide.

A. Transfer under 1404 (a) must protect plaintiffs selecting forum.

This Court, in *Van Dusen* v. *Barrack*, 376 U.S. 612, noted protection to be afforded plaintiffs in the face of fear expressed that "they will be deprived of the benefits of the public policy embodied in the (Pennsylvania there, Arkan-

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3. There are no less than 50 entries on this in 13 INDEX TO LEGAL PERIODICALS (1961-1964).

sas here) Constitution"—a strong public policy against limitation of death awards. *Popkin v. Eastern Air Lines, Inc.*, 204 F. Supp. 426, 433.

If the transferee Missouri court below can dismiss petitioners under *Van Dusen*—leaving them remediless—then the salutary features of 1404 (a) transfer have been abrogated by a result obviously not contemplated by Mr. Justice Goldberg's opinion in *Van Dusen* (at 633-634): "There is nothing . . . in the language or policy of §1404 (a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue."

B. Courts below completely disregarded the public policy, governmental interests, and relevant contacts of the forum, Arkansas.

All three judicial statements—of the transferor court (R. 8-14), transferee court (R. 16-23), and the court of appeals (Appendix A, p. A1)—neglected any consideration of the Arkansas Constitution and the relevant statutes which clearly reveal Arkansas policy (Appendix D, pp. A12-A13).

Indeed, it is suggested that for a forum to refuse to apply its own law and revert to the *Restatement I* rule amounts to an unconstitutional discrimination. Currie, "Unconstitutional Discrimination in the Conflict of Laws: Equal Protection," 28 *Univ. of Chic. L. Rev.* 30, cited by Leflar in *1961 Annual Survey of American Law* at 29.

Arkansas, contrary to most jurisdictions (*Van Dusen*, at 641), encourages suit by foreign administrators inasmuch as only the usual non-resident security for costs need be posted (Appendix D, pp. A12-A13). Also, the venue statute explicitly designates where the wrongful death action shall be brought when the death occurs outside of Arkansas (Appendix D, p. A12).

Consequently, when petitioners came to the front door of respondent with their claims they sought the policy determination of Arkansas law. This has been denied them by respondent's maneuver under 1404 (a).

No court in this case has yet explicated the public policy of Arkansas with reference to its circumstances. Surely principles of minimum standards of fairness demand this Court's firm hand to guarantee that there be a deliberate evaluation of public policy considerations rather than a mechanical application of an outworn concept of conflict of laws.

C. Erie-Klaxon formulations collapse unless plaintiffs secure an up-to-date expression of forum policy.

The use of the Erie-Klaxon doctrine to limit death damages is drawing fire from the commentators. Keeffe, "Pearson v. Northeast," 49 *A.B.A.J.* 305, 306. Perhaps a just result in this case would be a recovery for the survivors "in an unlimited amount in federal court by federal law."

It is submitted that, if Erie-Klaxon is to retain validity in securing results that are *just* as well as uniform, it must provide for flexibility to insure that fundamental policies of the law—state and federal—are vindicated. See Note, "Unclear State Law in the Federal Courts: Appellate Deference or Review," 48 *Minn. L. Rev.* 747, 753-754.

This Court's wisdom in remanding *Griffin* v. *McCoach*, 313 U.S. 498, to secure a definitive determination of the law of the forum, and the reference procedure adopted in *Clay* v. *Sun Insurance Office*, 363 U. S. 207, 212, provide a touchstone for just resolution of the case at bar.

Kaplan, "Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine," 16 *Univ. Miami L. Rev.* 413.

Absent such flexibility under Erie-Klaxon, there is presented the head-on clash between a mechanical interpretation of the vested rights doctrine espoused by the Eighth Circuit court below and the modern forum preference notions of conflict of laws most recently adopted in the Seventh Circuit. *Gianni* v. *Fort Wayne Air Service, Inc.*, 342 F.2d 621; *Watts* v. *Pioneer Corn Company, Inc.*, 342 F. 2d 617.

These issues lie at the heart of the federal court system. They present conflicts in decision and doctrine and call for this Court's attention.

II.

Under basic concepts of practice under the Federal Rules of Procedure, litigants are not to be turned out of court without a full opportunity to have whatever claims they state tried on the merits. *Conley* v. *Gibson*, 355 U.S. 41.

It is also established that "a party is entitled to review of the trial court's determination of state law just as he is of any other legal question in the case, and the decision of the local trial judge cannot reasonably be regarded as conclusive." 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright Ed.) 43.

Consequently, in the case at bar, petitioners were entitled to test out the trial court's dismissal of their action by appeal. Once the court determined that one particular interpretation of the pleadings was wrong, however, it came under a duty to remand under 28 U.S.C. § 2106, for trial on matters properly stated in the complaint (Appendix D, p. A12).

Surely the complaint states a claim for property damage to the automobile. Additionally, if the claim be tested

under Missouri law, a cause for wrongful death is stated on behalf of Wallace Glick by his next friend.

The fact that the demand for judgment exceeded $25,000 was irrelevant to determination of the sufficiency of the complaint inasmuch as the demand for judgment forms no part of the claim for relief. Fed. Rules Civ. Proc. 54 (c).

III.

This court left open in *Van Dusen* whether in all cases § 1404 (a) transfer would require application of the law of the transferor State (Mr. Justice Goldberg, at 639-640). It is submitted that the facts of the case at bar justify application of the forum law and, indeed, demand it.

A. Transferee court's order to conform petitioners' complaint to transferee State's law "in all respects" violates the ratio decidendi of Van Dusen.

Under the reasoning of *Van Dusen*, a general requirement that a transferee court shall order a plaintiffs' complaint styled in conformity with transferor State law is logical.

A converse order—requiring amendment to conform to transferee State law—is objectionable and flies in the very face of *Van Dusen*. Such was the order under review in this cause (R. 22).

B. The Van Dusen directive that capacity to sue must be determined by the law of the transferor State is violated by the district court here.

The transferee court, in dismissing, noted reliance on defense argument that petitioner Mrs. McGinty was not a proper party plaintiff "either in her individual or representative capacity" (R. 20). *Van Dusen* (at 642) directs

that transferor State law shall govern capacity to sue under Rule 17 (b). In the case at bar, Arkansas law should be the test of her capacity in her representative capacity.

Even under the mechanical vested rights doctrine adopted by the inferior courts, it is routinely held that matters of procedure are governed by forum law. Capacity to sue in a representative capacity is such a matter.

Consequently, an order to conform pleadings in all respects to the transferee State's law embraces procedural matters which are subject to the transferor's State law under any theory of conflict of laws. It is directly contrary to *Van Dusen* v. *Barrack*.

CONCLUSION.

The ruling below leaves the petitioners remediless, leaves wrongful death litigants at the mercy of defendants employing 1404 (a) transfers to subvert public policy established by State Constitutions, and directly flaunts the safeguards established by this Court in *Van Dusen* v. *Barrack*.

To uphold basic fairness to the parties, proper interpretation of 28 U.S.C. § 1404 (a) and § 2106, and to resolve the clash the rulings below present with those of this Court and the Seventh Circuit, this petition should be granted.

Respectfully submitted,

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APPENDIX A

Opinion Below

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,878

Wallace Glick, by his Next Friend, Bessie McGinty, and Bessie McGinty,
Appellants,
v.
Ballentine Produce, Incorporated,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 14, 1965.]

Before MATTHES and BLACKMUN, Circuit Judges, and REGISTER, District Judge.

MATTHES, Circuit Judge.

This action was instituted on April 17, 1963, in the United States District Court for the Western District of Arkansas by Wallace Glick, a minor, and Bessie McGinty (plaintiffs-appellants), Missouri citizens, seeking to recover damages from Ballentine Produce, Incorporated (defendant-appellee), an Arkansas corporation, having its principal place of business at Alma, Arkansas, for the

wrongful death of Marvin Glick. The deceased was the father of Wallace and former husband of Bessie. Diversity of citizenship and the requisite amount in controversy confers jurisdiction.

Appellants alleged in their complaint that "Wallace Glick is the surviving heir at law of Marvin Glick"; that "Bessie McGinty was the lawful wife of Marvin Glick"; and that Bessie McGinty "is the Next Friend as the natural guardian of their son, plaintiff Wallace Glick." The complaint further alleged that: "On October 14, 1962, in a public highway, U. S. 71 By-Pass in Jackson County, Missouri, defendant's vehicle, being driven by an employee of defendant as agent in the scope of employment for defendant, was negligently caused to collide with a vehicle being driven by Marvin Glick, deceased."[1] Appellants sought to recover pecuniary damages in the amount of $162,000 plus damage to their automobile in the sum of $4,000, or a total of $166,000.

On February 15, 1964, after the filing of the answer which incorporated a motion to make more definite and certain, appellee filed a motion for change of venue under 28 U.S.C.A. § 1404(a), contending that the accident upon which the cause of action was based occurred in Missouri; that the witnesses, investigating officers, physicians, and appellants were residents of that state; and that appellants had previously filed a suit in the Circuit Court of

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1. Although the complaint failed to allege the date of death of the deceased, Marvin Glick, in an amendment thereto filed February 17, 1964, at the direction of the court, appellants stated:

> "Further, said Bessie McGinty is the duly qualified administratrix of the estate of Marvin Glick, deceased, in accordance with the Letters of Administration granted to said Bessie Lee Stamper Glick (McGinty), which letters are attached hereto as 'Exhibit X.'"

The Letters of Administration, issued by the Probate Court of Jackson County, Independence, Missouri, on November 14, 1962, reveal that Marvin Wayne Glick died on October 14, 1962.

Clay County, Liberty, Missouri.[2] After the submission of memoranda by both parties, and on February 25, 1964, the Court, Judge Miller, filed its memorandum opinion (unreported) sustaining the motion to transfer, and ordered the case transferred to the United States District Court for the Western District of Missouri.

The following proceedings transpired in the United States District Court for the Western District of Missouri (Judge Duncan).

On March 20, 1964, appellee filed a motion to dismiss the complaint for failure to state a cause of action or to state a claim upon which relief could be granted. On March 23, 1964, appellants filed a motion to retransfer the cause to the Arkansas district court. In disposing of the motions the Court filed a memorandum opinion holding inter alia that the complaint attempted to plead a common law action for the death of Marvin Glick, and that "there is no such thing as common law action for death in the State of Missouri." The Court found that the complaint did not state a cause of action on behalf of Bessie McGinty, the widow, because she had failed to appropriate her cause of action within six months from the death of the deceased as provided by § 537.080 V.A.M.S., and that the complaint "is also defective in many other respects." The Court took cognizance of the federal rule that a complaint should not be dismissed with prejudice unless the plaintiffs could prove no facts in support of their claim which would allow them to recover, and en-

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2. In the Missouri state court action Ballentine Produce, Incorporated, appellee here, is one of the defendants. In that action Wallace Glick, one of the appellants here, is a plaintiff, and as in this case, he is seeking to recover damages, but not against Ballentine, for the loss of his father in the amount of $162,000. Bessie McGinty seeks damages from Ballentine and others in that action for loss of her minor sons, Philip and Robert, in the amount of $100,000 for each. The petition in that case alleges that Philip and Robert were also killed in the same collision forming the basis for this action.

tered an order granting appellants twenty days to file an amended complaint. The motion to retransfer was denied.

Instead of filing an amended complaint, appellants filed a "motion to modify order" in which they reasserted that the substantive law of Arkansas was applicable. This motion was denied.

On October 1, 1964, and upon motion of appellee, the Court entered its order dismissing the action on the merits. It is from this judgment of dismissal that appellants have perfected their appeal to this Court.

Before reaching the basic question at issue in this case, we shall, by way of summary, set forth the distinguishing pertinent characteristics of the substantive law applicable in Arkansas and Missouri to wrongful death actions.

In both jurisdictions a cause of action for wrongful death, not cognizable at common law, arises only by virtue of the wrongful death statutes which must be strictly adhered to in determining who may institute an action within the time limits provided therein. *Smith* v. *Missouri Pacific Railroad Co.*, 175 Ark. 626, 1 S.W.2d 48 (1927); *Vines* v. *Arkansas Power & Light Co.*, 337 S.W.2d 722 (Ark. 1960); *Knorp* v. *Thompson*, 352 Mo. 44, 175 S.W.2d 889 (1943); *Nelms* v. *Bright*, 299 S.W.2d 483 (Mo. en banc 1957); *Plaza Express Company* v. *Galloway*, 280 S.W.2d 17 (Mo. en banc 1955).

Turning to the statutes, in Arkansas § 27-906, Ark. Stat. 1947 Annotated, creates the cause of action; § 27-907 provides that the action shall be brought in the name of the personal representative of the deceased, and if there is no personal representative, then by the heirs of law of the deceased; § 27-909 provides for recovery of damages as will be fair and just compensation for pecuniary injuries sustained by the parties entitled thereto (no limit

fixed) including mental anguish suffered by the surviving spouse and next of kin of the deceased person. Additionally, there are Arkansas cases in which recovery was allowed for the conscious physical pain and mental anguish endured by the deceased after he sustained the fatal injury. Compare, *Chicago, R. I. & P. Ry. Co.* v. *Caple*, 179 S.W.2d 151 (Ark. 1944); *Beaty* v. *Buckeye Fabric Finishing Co.*, 179 F.Supp. 688 (E.D. Ark. 1959).

In Missouri, the cause of action is created by § 537.080 V.A.M.S.; and shall be commenced within one year after the cause of action accrues, § 537.100. The surviving spouse has the right to institute the action within six months after the death of the deceased. If there be no surviving spouse or he or she fails to sue within six months, the surviving minor child or children may institute the cause of action. If there be no surviving spouse, minor child or children, then suit may be instituted by the administrator or executor of the deceased. *Forehand* v. *Hall*, 355 S.W.2d 940 (Mo. 1942). The amount recoverable as damages is limited to $25,000. § 537.090 V.A.M.S.

From the inception of this case the issue has been whether the law of Arkansas or the law of Missouri is to be applied in determining (a) who has the right to institute and maintain the action, and (b) the amount that may legally be recovered as damages. No contention is made here concerning the propriety of Judge Miller's transfer of the case to the Missouri district court.

Appellants adamantly contend that "under modern conflict of laws approaches, Arkansas law must be applied because of the dominant contacts and significant relationship obtaining between this cause and the forum, Arkansas."[3]

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3. Appellants' cited authority for their position is *Griffith* v. *United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964).

Both the transferor and the transferee United States District Courts held, in effect, that regardless of the forum where the case is tried, Missouri law controlled the disposition and resolution of the above questions. We are in full accord.

It is fundamental that in diversity cases the federal courts, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964); *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941); *Griffin* v. *McCoach*, 313 U.S. 498 (1941); *Richards* v. *United States*, 369 U.S. 1 (1962); *Tinnon* v. *Missouri Pacific Railroad Company*, 282 F.2d 773, 775 (8 Cir. 1960).

Under the Arkansas conflict of laws rule the courts of that state look to the laws of the state where the tort occurred in determining who is entitled to recover and the amount recoverable. In *Trotter* v. *Ozarks Rural Electric Coop. Corporation*, 294 S.W.2d 498, 500 (1956), the Supreme Court of Arkansas stated: "Here it is conceded that the death of appellant's intestate occurred in Oklahoma, therefore, any right to recover and the measure of damages must be tested by the laws of that state," (citing cases). *Wheeler* v. *Southwestern Greyhound Lines*, 182 S.W.2d 214 (Ark. 1944) was an action for wrongful death which occurred in Missouri. The court applied the Missouri wrongful death statute in determining whether the petition stated a cause of action. See also *American Ry. Express Company* v. *Davis*, 152 Ark. 258, 238 S.W. 50 (1922); *Tipler* v. *Crafton*, 150 S.W.2d 625 (Ark. 1941); Leflar, Conflict of Laws, § 114 (1959); Restatement, Conflict of Laws, § 391 (1934).

We have carefully examined the *Van Dusen* case, supra, 376 U.S. 612, which appellants urge upon us in support

of their theory that Arkansas law must be applied. We do not regard the opinion as standing for this proposition. True it holds that in cases where the defendant seeks transfer, the transferee district court is obligated to apply the state law that would have been applied if there had been no change of venue, id. 639. Here, the transferor Arkansas district court properly held that Missouri law controlled and the transferee Missouri district court properly applied the same law.

Application of Missouri law convinces that the complaint failed to state a cause of action and is fatally defective. Appellants do not contend otherwise. In fact, in their motion to retransfer the case to the Arkansas federal court, they stated: "* * * Mrs. McGinty does not have a right to bring an action in this Court as administratrix * * *. Present Missouri law does not authorize such procedure."

In *Nelms* v. *Bright*, 299 S.W.2d 483, 487 (1957), the Missouri Supreme Court, en banc, in considering the essential elements of a cause of action under the wrongful death statute, reiterated the rule previously announced in *Chandler* v. *Chicago & A. R. Co.*, 251 Mo. 592, 600-601, 158 S.W. 35, 37 (1913):

> "'A party suing under the [wrongful death] statute referred to must bring himself in his *pleading and proof strictly within the statutory requirements necessary to confer the right. Otherwise his petition states no cause of action,* and his proof is insufficient to sustain his judgment. Only such persons can recover (and in such time and in such manner) as the letter of the law prescribes. *Only such persons may sue as the statute permits, and they alone can sue.* * * * It must "be conceded that the section reserves to itself the exclusive power of naming those who can main-

tain the action and of fixing the time in which each of the enumerated persons could sue.'" (Emphasis supplied).

In accord are the Arkansas cases of *Tipler* v. *Crafton*, supra, and *Wheeler* v. *Southwestern Greyhound Lines*, supra.

As we have seen, Bessie McGinty, widow and administratrix, and Wallace Glick, the minor son, filed the action jointly to recover damages for the alleged wrongful death in the amount of $162,000. There is no authority in Missouri law to support a joint cause of action by the widow and minor child or children. Under the Missouri wrongful death statute, § 537.080, the widow alone has the first right to sue. If she fails to appropriate her right within six months after the death of her husband, the minor child or children have the next six months in which to institute the action. In *Cummins* v. *Kansas City Public Service Co.*, 66 S.W.2d 920, 930 (1933), the Missouri Supreme Court, en banc, reviewed the history of the Missouri Act, and stated among other things:

> "The statute provides for but one cause of action * * *.
>
> * * *
>
> Whether the widow or the children have the right to enforce this cause of action, it remains the same cause of action and passes from one beneficiary to another. *They do not have a joint cause of action nor concurrent causes of action* * * *." (Emphasis supplied).

Because of the time limitation built into the statute for each of the designated parties, it is an essential element of the cause of action that the date of the death be pleaded, otherwise it cannot be determined whether the plaintiff has capacity to maintain the action. That was not done

here although, as indicated, this date appears from the letters of administration that were attached to the amendment to the complaint.

The petition is also defective in alleging that appellants were damaged in the amount of $162,000. The limit of recovery is $25,000.

From what has transpired, we believe Judge Duncan was justified in concluding that "the sole reason for attempting to maintain the action in Arkansas is [because] the laws of that jurisdiction are more favorable to the elements of damage than * * * the laws of Missouri." Appellants concede as much. Although they seemingly have recognized from the beginning that their complaint was deficient under Missouri law, they obstinately refused the opportunity to amend their complaint to state a cause of action. Perhaps they are more desirous of attempting to establish a new principle. Be that as it may, on this record and in light of the controlling legal principles, we are required to affirm the judgment of dismissal.

Affirmed.

A true copy.
Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment Below

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

September Term, 1965.

(Filed April 14, 1965)

Wallace Glick, by his next friend, Bessie McGinty, and Bessie McGinty, Appellants, vs. Ballentine Produce, Incorporated.	No. 17,878

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of Dismissal of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

April 14, 1965.

Order entered in accordance with Opinion:—

/s/ Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX C

Order Denying Rehearing

(Order denying petition of appellants for Rehearing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

(Filed May 10, 1965.)

Wallace Glick, etc., et al., Appellants,
vs.
Ballentine Produce, Inc.
No. 17878.

Appeal from the United States District Court for the Western District of Missouri.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

May 10, 1965.

APPENDIX D

Constitutional Provision and Statutes Involved

28 U.S.C. Sec. 1404 (a): For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. Sec. 2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Arkansas Constitution, 1874, as amended, Article 5, Sec. 32:

* * * (N)o law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to person or property; and in cases of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

Ark. R.S. 27-610.1 Acts 1961, No. 137, Sec. 1, p. 323: Actions for damages for personal injury or death by wrongful act, where the accident which caused the injury or death occurred outside this State, shall be brought in * * * any county in which the defendant * * * is summoned.

Ark. R.S. 27-805 Acts Feb. 1, 1843, Sec. 1, p. 105: Administrators * * * appointed in any of the States * * * under the laws thereof, may sue in any of the courts of this State, in their representative capacity, to the same and like effect

as if such administrators * * * had been qualified under the laws of this State; Provided, That such administrator * * * shall be required, before they shall institute such suit or proceeding, to execute the like bond as is required of other non-residents, by the laws of this State.

Ark. R.S. 27-906 Acts 1957, No. 255, Sec. 1, p. 790: Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured * * *.

Ark. R.S. 27-907 Acts 1957, No. 255, Sec. 2, p. 790: Every such action shall be brought by and in the name of the personal representatives of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act shall be commenced within three years after the death of the person alleged to have been wrongfully killed and not thereafter.

Ark. R.S. 27-909 Acts 1957, No. 255, Sec. 4, p. 790: The jury, or the Court in cases tried without a jury, may fix such damages as will be fair and just compensation for the pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and/or mental anguish resulting from such death, to the surviving spouse and next of kin of such deceased person. * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 431

WALLACE GLICK, by his next friend Bessie McGinty, and BESSIE McGINTY,

Petitioners,

vs.

BALLENTINE PRODUCE INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On April 17, 1963, petitioners filed their complaint in the United States District Court for the Western District of Arkansas. In that complaint, petitioners prayed for damages in the sum of $162,000.00 allegedly resulting from the death of petitioneers' decedent (father of Wallace Glick and former husband of Bessie McGinty) arising out of an automobile accident which occurred on a public highway in Jackson County, Missouri, on October 14, 1962. Petitioners are alleged to be citizens of the State of Missouri, and the respondent is a corporation incorporated in the State of Arkansas (R. 1, 2). Subsequently, Petitioners amended their complaint by adding the allegation that Bes-

sie McGinty is the duly qualified administratrix of the estate of Marvin Glick, deceased, and attached to said amendment the letters of administration granted by the Probate Court of Jackson County, Missouri, at Independence, appointing Bessie Lee Stamper Glick as the administratrix of the estate of Marvin Wayne Glick, deceased (R. 7). Respondent filed its Motion for Change of Venue (R. 5) and on February 25, 1964, the Court filed its Letter of Opinion (R. 8-14) and Order of Transfer to the United States District Court for the Western District of Missouri, Western Division (R. 7).

On March 20, 1964, respondent filed its Motion to Dismiss petitioners' complaint "for the reason that said complaint fails to state a cause of action or to state a claim against the defendant upon which relief may be granted." (R. 15). On March 23, 1964, petitioners filed their Motion to Transfer, moving for retransfer of the cause to the Western District of Arkansas, and asserted, among other things, as grounds thereof, that "Plaintiffs are entitled to have their claims tested by the law of the original forum, Arkansas" (R. 15). Thereafter, on April 24, 1964, the District Court below entered its order overruling motions to retransfer and to dismiss (R. 16). The District Court held: there is no such thing as a common-law wrongful death action in the State of Missouri (R. 20); the cause of action arose in Missouri and is governed by the substantive law of Missouri whether it be tried in the State of Arkansas or State of Missouri (R. 20, 21); if the case were tried in the State of Arkansas, it would apply the substantive law of the State of Missouri where the action arose (R. 23). Petitioners were granted twenty days in which to file an amended complaint, the Court stating that "Upon failure to do so at the end of that period, the defendant's Motion to Dismiss will be sustained." (R. 22).

Petitioners thereafter filed their Motion to Modify Order on May 12, 1964, which was overruled by the Court on May 26, 1964 (R. 23-26). Petitioners then sought a Writ of Prohibition or Mandamus (R. 26), which petition was denied by the Court of Appeals below, on June 8, 1964 (R. 29).

On September 22, 1964, respondent filed its Motion for Entry of Order of Dismissal of Plaintiffs' Complaint (R. 29), grounded upon the failure of petitioners to file an amended complaint in conformity with the Court's order of April 24, 1964. On October 1, 1964, the District Court filed its Order of Dismissal, noting that petitioners failed to comply with the Court's order of April 24, 1964, that suggestions in opposition to the Motion for Entry of Order of Dismissal were filed by the petitioners, and that it was apparent to the Court that petitioners had no intention of amending their complaint or complying with the Court's order (R. 30).

Subsequently, on October 16, 1964, petitioners filed Notice of Appeal to the United States Court of Appeals for the Eighth Circuit, appeal was perfected, briefs filed, argument had, and the Court of Appeals rendered its opinion on April 14, 1965 (Petition for Writ, A 1; 343 F.2d 839). Judgment affirming the Judgment of Dismissal of the District Court below was entered on April 14, 1965 (Petition for Writ, A 10). Order denying petition for rehearing was entered by the Court of Appeals on May 10, 1965 (Petition for Writ, A 11).

The appeal from the District Court to the Court of Appeals was from the Order of the District Court, dismissing the complaint, upon the respondent's Motion to Dismiss for the reason that the complaint failed to state a cause of action or claim upon which relief may be granted.

The question presented on that appeal was whether the substantive law of Arkansas or the substantive law of Missouri is applicable to this cause of action, and whether the complaint stated a cause of action and claim upon which relief may be granted under the applicable and controlling law.

This Petition for Writ of Certiorari seeks review of the Order and Judgment of affirmance of the Court of Appeals below. The question, thus presented on this Petition, is whether under Rule 19 of the Rules of this Court, there is some special and important reason for this Court to review the action of the Courts below.

ARGUMENT

Countering Petitioners' Reasons for Granting Writ

I

The first reason asserted by petitioners, erroneously states that the Courts below did not examine and apply the public policy, statutes and conflict of laws rule of the State of Arkansas.

Reference to the opinion of the Court of Appeals (Petition for Writ, A 1, l.c. A 4-A 6; 343 F.2d 839, l.c. 841-843) does not support petitioners' statement. Also, reference to the opinion of the United States District Court for the Western District of Arkansas (R. 8, l.c. 12), and the opinion of the United States District Court for the Western District of Missouri (R. 16, l.c. 20-21), impels the conclusion that all three of the Courts below made a very careful and detailed analysis of the conflict of laws rule of the State of Arkansas. The cases cited in all three opinions make it clear, beyond any shadow of doubt, that the present and continuing rule of law, in the State of Arkansas, is that the cause of ac-

tion and death of plaintiffs' decedent having occurred and arisen in the State of Missouri, the cause is controlled and governed by the substantive law of Missouri, even though brought and tried in the State of Arkansas.

Neither the section of the Constitution of Arkansas nor the Arkansas statutes cited by petitioners purport to determine the conflict of laws question herein involved. The Supreme Court of Arkansas has clearly held that under the Arkansas conflict of law rule, the courts of that state look to the laws of the state where the tort, i.e. wrongful death, occurred, to determine who is entitled to sue and the amount recoverable. *Trotter* v. *Ozark's Rural Electric Coop.*, 294 S.W.2d 498 (1956); *Wheeler* v. *Southwestern Greyhound Lines*, 182 S.W.2d 214 (1944).

Petitioners suggest that the "Erie-Klaxon Doctrine" requires the use of reference procedure and certification of the question to the Supreme Court of Arkansas, and further suggest that the decision, of the Court of Appeals below, is in conflict with decisions of the Seventh Circuit Court of Appeals. This simply is not so. The cases of *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941), and *Richards* v. *United States*, 369 U.S. 1 (1962), simply recognize and set forth the fundamental rule in diversity cases, i.e., the Federal Courts must follow the rules prevailing in the states in which they sit, when deciding questions of conflict of law. This is exactly what the Courts below did. The Arkansas citations, *supra*, and in the opinions of the three Courts below, make it clear that there is no need "to secure a definitive determination of the law" of Arkansas. That law is clear, conclusive and absolute in its conflict of laws rule. The Seventh Circuit cases, cited by petitioners, *Gianni* v. *Fort Wayne Air Service, Inc.*, 342 F.2d 621, and *Watts* v. *Pioneer Corn Company, Inc.*, 342 F.2d 617, are clearly not in conflict with

the opinions of the Courts below. Those two cases recognize that some few states, by action of state appellate courts, have adopted what is known as the "dominant contacts" rule in deciding a conflict of laws question as to what substantive law will be followed. The Court then noted that it found no decisions on this point by the state courts of Indiana, and therefore had to determine what it thought the Indiana courts would hold and proceeded to apply the "dominant contacts" rule. However, neither the Seventh Circuit Court of Appeals, nor any other federal court, so far as this respondent can find, has attempted to impose this or any other conflict of law rule in a state that has already determined that question for itself. Petitioners' attempt to do so, in this case, flies in the face of this Court's opinion in *Klaxon Co.* v. *Stentor Co., supra,* and has no merit.

II

The second reason of petitioners is self-contradictory. In the same breath it is contended that they should be given an opportunity to amend their complaint and that the complaint already states a claim for relief for wrongful death, under Missouri law.

Neither is the case. In his opinion, Judge Duncan of the United States District Court of Missouri, after holding that the complaint does not allege a cause of action for wrongful death under Missouri law, recognized the rule of *Conley* v. *Gibson,* 355 U.S. 41, and other cases, and gave the petitioners opportunity to file an amended complaint. This, the petitioners obstinately refused to do. Neither 28 U.S.C., Section 2106, nor any other statute or rule of civil procedure, requires a Court of Appeals to reverse and remand for further amendment of a complaint in such a situation. Petitioners cite neither fact nor law

that present even a hint that the Court of Appeals below abused its discretion in this regard.

As far as the complaint itself, both the District Court for the Western District of Missouri and the Court of Appeals below carefully analyzed the complaint, citing the leading Missouri cases which set forth the substantive wrongful death law of Missouri, and both Courts held that the complaint fails to state a cause of action or a claim upon which relief can be granted. Petitioners now fail to cite, because there is none, a single Missouri case to support the position that the complaint stated a cause of action. Indeed, we are forced to point out that this is the first time that petitioners have even asserted such a position, and this question, now raised in support of a reason for granting certiorari, was never raised in the District Court or the Court of Appeals below.

III

The third reason, assigned by petitioners, is obviously a complete misconception of the opinion of this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964). This Court held, in that case, that when a cause is transferred pursuant to Section 1404 (a), the transferee court shall apply the same substantive law which would have been applied by the transferor court. As pointed out, *supra*, all three of the Courts below correctly held that if the case were tried in Arkansas, either in State or Federal court, the established Arkansas conflict of laws rule would require that the case be governed by the Missouri substantive wrongful death law, and therefore that is the same law that must be and was applied by the Missouri District Court.